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In the Texas Court of Criminal Appeals

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DEANA WILLIAMSON, CLERK

Anthony Rashad George
Petitioner-Appellant

vs.

The State of Texas
Respondent-Appellee

From the Fifth Court of Appeals,
Case 05-18-00941-CR

Appeal from the 282nd Judicial District Court in
Dallas County, Case F16-76714-S

Petitioner-Appellant's Brief

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Statement of the Case

In this capital-murder case, the trial court refused to instruct the jury on the lesser-included offense of robbery despite testimony from one accomplice that another man—not Anthony George—fought the victim, and from another accomplice that “[t]he intention was just to go up there and get money”—“[i]t was never for anybody to get hurt”—and that *she* anticipated only that the victim “was gonna get robbed.” RR8: 217-18, 221-22, 242-43, 291; RR9: 163, 165. After the State then argued in closing that murder should always be anticipated as a potential result of robbery, the jury found George guilty. RR10: 232, 285, 290, 295.

Other than modifying the trial court’s judgment, the Fifth Court of Appeals affirmed, reasoning that, “when one decides to steal property from another,” he should indeed “anticipate he or his co-conspirator might be confronted by that individual and that his co-conspirator might react violently to that confrontation.” *George v. State*, 05-18-00941-CR, 2019 WL 5781917, at *6 (Tex. App.—Dallas Nov. 6, 2019, no pet. h.) (citing *Allen v. State*, No. 05-03-00196-CR, 2004 WL 1637885, at *7 (Tex. App.—Dallas July 23, 2004, no pet.) (not designated for

publication); *Moore v. State*, 24 S.W.3d 444, 447 (Tex. App.—Texarkana 2000, pet. ref’d)). The court ignored two cases from its sister courts that recognized that murder should not always be anticipated as a potential result of robbery. *See Turner v. State*, 01-08-00657-CR, 2010 WL 3062013, at *8 (Tex. App.—Houston [1st Dist.] July 30, 2010, no pet.); *Tippitt v. State*, 41 S.W.3d 316, 326 (Tex. App.—Fort Worth 2001) (abrogated on other grounds by *Hooper v. State*, 214 S.W.3d 9 (Tex. Crim. App. 2007)). On February 26, 2020, this Court granted George’s petition for discretionary review.

Issue Presented

Whether murder should always be anticipated as a potential result of robbery.

Statement of Facts

On three separate occasions on November 27, 2016, Brian Sample paid prostitutes Jessica Ontiveros and Rachel Burden to come to his Dallas hotel room. RR9: 101, 107, 115, 118-19. Sample had been holed up there for days, high on cocaine, methamphetamine, and something called GHB. RR8: 68, 212; RR9: 181.

In between their visits, Ontiveros and Burden told George—their boyfriend and pimp, respectively (RR8: 204-10; RR9: 86-92)—that Sample had a great deal of cash and would be an easy robbery target. RR8: 243; RR9: 165. Hotel surveillance video shows that shortly before 3:00 p.m., George and another man, Rodney Range, entered Sample’s hotel. RR10: 83-85. Approximately 17 minutes later, George and Range left. RR8: 83; RR10: 87. Hotel staff later discovered Sample’s body on his bed. RR7: 279. A medical examiner determined that he “died as a result of homicidal violence including asphyxia and blunt-force injuries.” RR8: 175.

George, Range, Ontiveros, and Burden all were charged with capital murder. CR: 18; RR8: 175, 263; RR9: 10, 162; *see* Tex. Pen. Code § 19.03(a)(2); *State v. Range*, F17-75020. George pleaded not guilty, and at his jury trial, Ontiveros—the only witness to what occurred in Sample’s room, still there on her third visit (RR8: 213)—testified that after Range and George entered the room, Sample ran towards them. RR8: 217-18. Range then put Sample in a chokehold and fought him over to the bed. RR8: 218. After Sample was subdued, Range bound him with zip-ties and began “tossing” the room for things to steal. RR8:218,

248. George, all the while, was “just standing there”—trying to calm Ontiveros and telling her she could not yet leave. RR8: 218, 221-22, 242-43, 291.

At the close of the State’s evidence, the defense unsuccessfully moved for a directed verdict. RR10: 217-18. The State indeed failed to show that George was guilty of anything more than robbery, however, so the defense then rested too, asking the court to instruct the jury on that lesser-included offense. RR10: 227, 241. The State agreed that “aggravated robbery would be appropriate.” RR10: 232. But the court denied George’s request altogether, reasoning that “it can’t just be that... there’s a lack of evidence of the greater offense.” RR10: 232. The court wasn’t moved by George’s identification of Burden’s testimony that “[robbery] was the only plan and agreement that they were supposed to do and it was to take the personal property from the decedent.” RR10: 232. The State then argued in closing that “[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder.” RR10: 285.

Summary of the Arguments

The court of appeals held that George was not entitled to a robbery instruction because “when one decides to steal property from another, he should anticipate he or his co-conspirator might be confronted by that individual and that his co-conspirator might react violently to that confrontation.” *George*, 2019 WL 5781917 at *6 (citing *Allen*, 2004 WL 1637885 at *7; *Moore*, 24 S.W.3d at 447). But neither *Moore* nor *Allen* actually supports the court of appeals’ holding. And by adopting those cases’ broad language all the same, the court of appeals arguably held that even every theft should be anticipated to result in a murder. In *Turner v. State*, however, the court considered the precise issue here and held that the trial court erred in refusing to instruct the jury on the lesser-included offense of robbery. *Turner*, 2010 WL 3062013. And in *Tippitt v. State*, the court of appeals explicitly stated that “robbery is [not] an offense of such a violent nature that murder should always be anticipated as a potential risk of its commission.” *Tippitt*, 41 S.W.3d at 324 (abrogated on other grounds by *Hooper*, 214 S.W.3d 9).

Turner and *Tippitt* got it right. A person is guilty of robbery under subsection (a)(2) of the statute if, in the course of committing a theft, he merely threatens or places another in fear of imminent bodily injury or death. Tex. Pen. Code § 29.02. And while a person is guilty under subsection (a)(1) if, in the course of committing a theft, he actually “causes bodily injury to another,” *id.*, this Court has interpreted the definition of “bodily injury” expansively, “seem[ingly] encompass[ing] even relatively minor physical contacts so long as they constitute more than mere offensive touching.” *United States v. Burris*, 920 F.3d 942, 958 (5th Cir. 2019). Robbery therefore really isn’t “an offense of such a violent nature that murder should always be anticipated as a potential risk of its commission.” *Tippitt*, 41 S.W.3d at 324. And absent that categorical rule, there’s no evidence that George should have anticipated that Range would murder Sample. The trial court erred in refusing to include robbery in the charge, and the court of appeals erred in concluding otherwise.

If nothing else, this Court should reverse the court of appeals’ judgment and remand this case to that court to consider the harm from the trial court’s failure to include robbery in the jury charge. But

because a finding of some harm¹ is essentially automatic, George further urges this Court that, in the interest of judicial economy, this Court should reverse the lower courts' judgments and remand this case for a new trial. *See Johnston v. State*, 145 S.W.3d 215, 224 (Tex. Crim. App. 2004).

Arguments

1. Murder should not always be anticipated as a potential result of robbery.

a. The court of appeals held that George was not entitled to a robbery lesser-included instruction on the basis that every robbery should be anticipated to result in murder.

A trial court should give a charge on a lesser-included offense when (1) the lesser-included offense is included within the proof necessary to establish the offense charged, and (2) there is some evidence that would permit a rational jury to find that the defendant is guilty of the lesser offense but not guilty of the greater. *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). As the court of appeals recognized, “[i]t is undisputed robbery is a lesser-included offense of

¹ Because George's charge complaint was preserved by an objection or request for instruction, reversal is required if George suffered “some harm.” *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013).

murder.” *George*, 2019 WL 5781917 at *6 (citing *Solomon v. State*, 49 S.W.3d 356, 369 (Tex. Crim. App. 2001)). The only question here, then, is whether there was some evidence from which a rational jury could acquit George of capital murder but convict him of robbery. *Salinas*, 163 S.W.3d at 741.

As to that question, the evidence must be evaluated in the context of the entire record, and appellate courts may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). “[A]nything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge.” *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). In short, “[a]ny evidence that the defendant is guilty only of the lesser-included offense is sufficient to entitle the defendant to a jury charge on the lesser-included offense.” *Moore*, 969 S.W.2d at 8 (emphasis added).

Before the court of appeals, George explained that there was at least a scintilla of evidence that he was guilty only of robbery. Again, Ontiveros testified that while Range murdered Sample, George was “just standing there,” trying to calm her down and telling her she could

not leave. RR8: 218, 221-22, 242-43, 291. And though George also could be guilty of capital murder on a showing that Sample's death should have been anticipated as a result of the robbery, *see* Tex. Pen. Code § 7.02(b), Burden testified that "[t]he intention was just to go up there and get money"—"[i]t was never for anybody to get hurt"—and *she* anticipated only that Sample "was gonna get robbed." RR9: 163, 165. There is no evidence, for example, that George "knew his co-conspirators might use guns in the course of the robbery." *See Canfield v. State*, 429 S.W.3d 54, 69–70 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (collecting cases holding that where a defendant knows his co-conspirators might use guns in the course of the robbery, that can be sufficient to demonstrate that the defendant should have anticipated the possibility of murder occurring during the course of the robbery).

Making no mention of the fact that, when considering whether there's any evidence that a defendant is guilty only of a lesser-included offense, an appellate court may not consider whether the evidence is credible, controverted, or in conflict with other evidence, the State in response wholly ignored Ontiveros's and Burden's trial testimony. St. Br. at 27-29. Instead, pointing to Ontiveros's pre-trial claim that George

was the aggressor in the hotel room fight, the State characterized the evidence as showing only that George himself killed Sample. St. Br. at 28-29. The State further claimed—with absolutely no explanation—that, in any event, “there is no evidence that [Sample’s] death was not anticipated, much less any evidence that the death should not have been anticipated.” St. Br. at 29.

The court of appeals did not go for the State’s characterization of the evidence as showing only that George himself killed Sample. *See George*, 2019 WL 5781917 at *6. And the court acknowledged that Burden testified “she thought appellant was only going to rob decedent, and ‘[i]t was never for anybody to get hurt.’” *Id.* Nonetheless, the court held that there was “no evidence”—none—that Sample’s death “was not anticipated or that it should not have been anticipated.” *Id.* For “when one decides to steal property from another,” the court reasoned, “he should anticipate he or his co-conspirator might be confronted by that individual and that his co-conspirator might react violently to that confrontation.” *Id.* (citing *Allen*, 2004 WL 1637885 at *7; *Moore*, 24 S.W.3d at 447). This echoed the State’s closing argument at trial—the basis of George’s third ground on appeal, to which the trial court

sustained George’s objection, and which the State did not defend on appeal—that “[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder.” RR10: 285.

b. The First and Second Courts of Appeals have recognized that not every robbery should be anticipated to result in murder, and they are right.

As an initial matter, neither of the cases to which the court of appeals cited in support of its holding in fact stand for the proposition that any robbery should be anticipated to result in murder. Though both opinions broadly pronounced that, “[w]hen one decides to steal property from another, he should anticipate that he or his co-conspirators might be confronted by that individual and that his co-conspirators might react violently to that confrontation,” neither addressed whether a lesser-included offense should be included in a jury charge. Both addressed whether evidence was legally and factually sufficient—a much different question²—and to support aggravated

² “Regardless of its strength or weakness, if *any* evidence raises the issue that [a] defendant was guilty only of the lesser offense, then the charge must be given.” *O’Brien v. State*, 89 S.W.3d 753, 755 (Tex. App.—Houston [1st Dist.] 2002, pet. ref’d) (citing *Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992)). Appellate courts review the legal sufficiency of the evidence, by contrast, by viewing the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a

robbery convictions, to boot. *See Allen*, 2004 WL 1637885 at *7; *Moore*, 24 S.W.3d at 447. By adopting those cases’ broad language all the same, the court of appeals here arguably held that even every theft should be anticipated to result in a murder. *George*, 2019 WL 5781917 at *6; *cf. Nava v. State*, 379 S.W.3d 396, 406 (Tex. App.—Houston [14th Dist.] 2012), *aff’d*, 415 S.W.3d 289 (Tex. Crim. App. 2013) (“We agree with appellants that theft is not a crime which inherently entails the threat of violence.”).

In *Turner v. State*, however, the court considered the precise issue here. *Turner v. State*, 2010 WL 3062013. In that robbery-turned-capital-murder case, like this one, a jury convicted the defendant of capital murder after the trial court refused to instruct the jury on the lesser-included offense of robbery. The court of appeals concluded that the trial court erred, explaining that the defendant’s statements to the police, “that he did not know [his co-conspirator] had a gun and that he did not see the gun until [his co-conspirator] pointed it at [the victim],” “constitute[d] some evidence that, if believed by the jury, could have

reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005).

supported a conclusion that although [the defendant] was guilty of conspiracy to rob the [convenience] store, he nevertheless did not reasonably anticipate that [his co-conspirator] would commit murder in furtherance of the conspiracy.” *Id.* at *8.

Robbery should not always be anticipated to result in murder, then. And indeed, the court in *Tippitt v. State*, explicitly said as much, and on its way to holding that the evidence was legally insufficient to support that the defendant should have anticipated that a robbery would lead to a murder. *Tippitt*, 41 S.W.3d at 326 (abrogated on other grounds by *Hooper*, 214 S.W.3d 9). In *Tippitt*, during the course of a planned robbery of a drug dealer, the defendant’s accomplice pulled out a gun and murdered the dealer. *Id.* at 319-320. Though there was no showing that the defendant knew his accomplice carried a gun, the defendant was convicted of capital murder under the theory of parties’ liability. *Id.* at 319, 321.

The Second Court of Appeals held that a defendant’s entrance into a conspiracy to commit robbery cannot itself support his capital murder conviction as a co-conspirator—there must be some additional evidence showing that he should have anticipated the robbery would result in

murder. *Id.* at 324. If “a defendant knew his co-conspirators might use guns in the course of the robbery,” for example—that “can be sufficient to demonstrate that the defendant should have anticipated the possibility of murder occurring during the course of the robbery.”

Canfield, 429 S.W.3d at 69–70. But “robbery is [not] an offense of such a violent nature that murder should always be anticipated as a potential risk of its commission,” the *Tippitt* court explained, “and we have found no case that suggests otherwise.” *Tippitt*, 41 S.W.3d at 324. Indeed, “[i]n virtually all of the Texas cases we have found in which an appellate court has found legally or factually sufficient evidence to uphold a capital murder conviction under the theory of criminal responsibility contained in section 7.02(b), there has been evidence that the appellant was on notice that murder was a possible result of the carrying out of a conspiracy to commit another felony”—again, usually because the appellant knew a conspirator carried a firearm or other deadly weapon.

*Id.*³

³ The court cited a long list of cases:

Fuller v. State, 827 S.W.2d 919, 932 (Tex. Crim. App. 1992) (holding murder should have been anticipated as a possible result of robbery where appellant admitted having a pocketknife with him at the time of entry and that one of his cohorts usually would have had a knife in that situation);

Green v. State, 682 S.W.2d 271, 285–86 (Tex. Crim. App. 1984) (holding murder should have been anticipated as a possible result of robbery where appellant admitted entering the house armed with a gun);
Simmons v. State, 594 S.W.2d 760, 764 (Tex. Crim. App. 1980), cert. granted, judgment vacated on other grounds, 453 U.S. 902 (1981) (holding evidence sufficient to support finding that murder should have been anticipated as a result of robbery where testimony showed, at time of agreement to commit robbery, appellant stated he was going to beat victim, co-defendant pulled out knife and said he was going to stab victim, and appellant said he was going to put victim in graveyard);
Ruiz v. State, 579 S.W.2d 206, 209 (Tex. Crim. App. [Panel Op.] 1979) (holding direct evidence of appellant’s participation in aggravated robbery in concert with other individuals while brandishing a deadly weapon would permit any jury to infer that murder should have been anticipated as a result);

Williams v. State, 974 S.W.2d 324, 330 (Tex. App.—San Antonio 1998, pet. ref’d) (holding evidence sufficient that murder committed in the course of pawn shop robbery was foreseeable to appellant where evidence showed at least one of the five conspirators arrived at the scene armed with a gun, there was testimony by accomplice witness that four of the five conspirators left her apartment with weapons, and there was evidence that bullets or casings from two different guns were recovered from the scene);

Coleman v. State, 956 S.W.2d 98, 102 (Tex. App.—Tyler 1997, pet. ref’d) (holding evidence sufficient to support finding that appellant should have anticipated murder as a result of conspiracy to commit carjacking where evidence showed that, just prior to subject offense, confederate unsuccessfully tried to carjack another vehicle in appellant’s presence by wielding a .45 caliber pistol, confederate announced he was going to get the victim’s car, and after following victim home, confederate armed himself with .45 caliber pistol, appellant armed himself with sawed-off shotgun, appellant admitted having knowledge of weapons in car, and appellant admitted supplying the shotgun);

Queen v. State, 940 S.W.2d 781, 788 (Tex. App.—Austin 1997, pet. ref’d) (holding murder should have been anticipated as a possible result of robbery where evidence showed appellant knew that cohort was member of violent street gang and had reputation for violence in community, appellant had “hung out” with violent cohort on numerous occasions for two months before murder, appellant admitted striking brain-damaged victim and searching his pockets, and appellant conceded that cohorts continued to beat victim when he left victim’s apartment);

Alvarado v. State, 816 S.W.2d 792, 796 (Tex. App.—Corpus Christi 1991) (holding appellant should have anticipated murder would occur as a result of burglary where

To be sure, this Court in *Hooper v. State*, 214 S.W.3d 9 (Tex. Crim. App. 2007), disapproved of *Tippitt*'s "citat[ion of] a rule that when conducting a legal sufficiency review a vital fact may not be established by stacking inference upon inference." *Id.* at 15. Not because inference stacking is an "improper reasoning process," though—just because the term "adds unnecessary confusion to the legal sufficiency review without adding any substance." *Id.* at 16. "Rather than using the language of inference stacking," this Court explained, "courts of appeals should adhere to the *Jackson* standard and determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Id.* at 16-17. In any event, though, *Hooper* said

appellant instigated burglary conspiracy, chose victim's house, stated that victims would have to be beat up or killed, and directed cohorts to kill victims while watching), *aff'd as modified*, 840 S.W.2d 442 (Tex. Crim. App. 1992);

Naranjo v. State, 745 S.W.2d 430, 433–34 (Tex. App.—Houston [14th Dist.] 1988, no pet.) (holding murder should have been anticipated as a possible result of robbery where evidence showed appellant was aware cohorts were armed, appellant exhibited prior understanding that aggravated robbery would occur, and appellant returned to the scene of offense to retrieve victim's wallet while victim still lay on floor dying); and

Flores v. State, 681 S.W.2d 94, 96 (Tex. App.—Houston [14th Dist.] 1984) (holding murder should have been anticipated as a possible result of burglary where appellant knew companion had a gun), *aff'd*, 690 S.W.2d 281 (Tex. Crim. App. 1985).

nothing about *Tippitt*'s conclusion that "robbery is [not] an offense of such a violent nature that murder should always be anticipated as a potential risk of its commission, and we have found no case that suggests otherwise." *Tippitt*, 41 S.W.3d at 324.

Turner and *Tippitt* were right. A person is guilty of robbery under subsection (a)(2) of the statute if, in the course of committing a theft, he merely threatens or places another in fear of imminent bodily injury or death. Tex. Pen. Code § 29.02. And while a person is guilty under subsection (a)(1) if, in the course of committing a theft, he actually "causes bodily injury to another," *id.*, this Court has interpreted the definition of "bodily injury" expansively, "seem[ingly] encompass[ing] even relatively minor physical contacts so long as they constitute more than mere offensive touching." *Burris*, 920 F.3d at 958. In *Lane v. State*, 763 S.W.2d 785 (Tex. Crim. App. 1989), for example, this Court found bodily injury because the victim's "wrist was twisted" and she sustained a "bruise on her right wrist." *Id.* at 787 (citing *Lewis v. State*, 530 S.W.2d 117, 117–18 (Tex. Crim. App. 1975) (holding that "a small bruise" constituted bodily injury)); *see also Gay v. State*, 235 S.W.3d 829, 833 (Tex. App.—Fort Worth 2007) (indicating that "pinch[ing]" or

“rubbing” a child’s face amounted to bodily injury). Pain is not even a requirement—any “impairment of physical condition” is bodily injury. See Tex. Pen. Code § 1.07 (a)(8) (“‘Bodily injury’ means physical pain, illness, or any impairment of physical condition.”).

Robbery, therefore, really isn’t “an offense of such a violent nature that murder should always be anticipated as a potential risk of its commission.” *Tippitt*, 41 S.W.3d at 324. And indeed, it’s not just *Turner* and *Tippitt* that have recognized as much. The Dallas Court of Appeals has too. And not in some obscure, long-forgotten opinion—in *this case*. In considering Issue Three, and the State’s closing argument that “It is absolute[ly] foreseeable that any robbery is gonna result in murder,” the court remarked that “a statement indicating the foreseeability that any robbery will result in murder is inappropriate.” *George*, 2019 WL 5781917 at *7. The court did “not condone the statement.” *Id.*

Not every robbery should be anticipated to result in murder. The court of appeals erred in holding otherwise, and absent that categorical rule, there’s no evidence that George should have anticipated that Range would murder Sample. Like in *Tippitt*, there’s no evidence George knew Range carried a deadly weapon—Range didn’t carry a

deadly weapon at all. *See Tippitt*, 41 S.W.3d at 325–26. There is no evidence of any discussion about using violence or force to subdue Sample. And like in *Tippitt*, there is no evidence that George knew that Range had some reputation as prone to violence. *Id.* Here, like there, there was, thus, at least some evidence that could have supported a conclusion that, although George was guilty of conspiracy to rob Sample, he nevertheless should not have anticipated that Range would murder Sample in furtherance of the conspiracy. The trial court erred in refusing to include robbery in the charge, and the court of appeals erred in concluding otherwise.

2. Because the erroneous charge left the jury with no option but to convict George of criminal homicide or acquit him, a finding of harm is essentially automatic.

If nothing else, this Court should reverse the court of appeals’ judgment and remand this case to that court to consider the harm from the trial court’s failure to include robbery in the jury charge. But because the record makes clear that the trial court’s error was harmful, George further urges this Court that, in the interest of judicial economy, this Court should reverse the lower courts’ judgments and remand this case for a new trial. *See Johnston*, 145 S.W.3d at 224 (“Normally,

having found that the court of appeals erred in upholding the admission of this evidence, we would remand the case to that court to conduct a harmless error review. However, in this case, the State argues, and we agree, that any error is so plainly harmless that we should resolve that issue for the sake of judicial economy.”).

The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an *Almanza* harm analysis. *Saunders*, 840 S.W.2d at 392); *see Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Because George’s charge complaint was preserved by an objection or request for instruction, reversal is, thus, required if George suffered “some harm.” *Vega*, 394 S.W.3d at 519. “When the trial court’s failure to submit the requested lesser-included-offense instruction has ‘left the jury with the sole option either to convict the defendant of the greater offense or to acquit him,’” however, “a finding of harm is automatic.” *Turner*, 2010 WL 3062013, at *8 (quoting *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)); *see also Robalin v. State*, 224 S.W.3d 470, 477 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (“When a trial court improperly refuses a requested instruction on a lesser-included offense, such that

the jury is left with the sole option of either convicting the defendant or acquitting him, a finding of harm is essentially automatic.”); *Brock v. State*, 295 S.W.3d 45, 49 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d) (stating same); *Ray v. State*, 106 S.W.3d 299, 302–03 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (stating same).

Here, the trial court did instruct the jury on other lesser-included offenses (murder and manslaughter). CR: 152-53. And in that circumstance, some harm isn’t necessarily automatic. *Saunders*, 913 S.W.2d at 571-74. In *Saunders*, for example, the defendant was charged with murder, and the trial court instructed the jury on the lesser-included offense of involuntary manslaughter but not negligent homicide. This Court held that the jury’s decision to find the defendant guilty of murder negated a finding of some harm because even without a negligent-homicide instruction, the involuntary-manslaughter instruction gave the jury an opportunity to compromise between murder and acquittal—an opportunity the jury declined to embrace. *Id.*

This case isn’t *Saunders*. The disputed issue was not the degree of homicide of which George was guilty—it was whether George was not guilty of any criminal homicide, guilty only of robbery. Instructing the

jury on the lesser-included offenses of murder and manslaughter, thus, did not provide a compromise on that issue, as it did not give the jury the option of convicting on a charge that did not include as an element George's causation or anticipation of Sample's death. *See Turner*, 2010 WL 3062013 at *9 ("The jury was not offered the possibility of convicting on any charge that did not include as an element Turner's reasonable anticipation of a murder committed by Brown. Thus, although the trial court instructed the jury on one lesser-included offense, on the facts of this case, felony murder was not a compromise in regard to the issue of anticipation."). "Some harm" is, thus, indeed automatic, and this Court should reverse George's conviction and remand for re-trial. *See id.* (holding capital-murder defendant harmed by lack of robbery instruction despite felony-murder instruction) (citing *Saunders*, 913 S.W.2d at 571); *Robalin*, 224 S.W.3d at 477.

Prayer

George respectfully requests this Court reverse the lower courts' judgments and remand this case for a new trial. Alternatively, George respectfully requests this Court reverse the court of appeals' judgment and remand this case to that court to consider the harm from the trial

court's refusal to include the lesser-included offense of robbery in the jury charge.

Respectfully submitted,

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